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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VLAD OLEG LARIN,

Defendant and Appellant.

F074997

(Super. Ct. No. BF163851A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Eric Bradshaw, Judge.

Lindsay Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Meehan, J. and Snauffer, J.

A jury convicted Vlad Oleg Larin, appellant, of battery causing serious bodily injury, and misdemeanor assault. On appeal, appellant contends the trial court should have instructed the jury on the limited right of an initial aggressor or participant in mutual combat to lawfully use deadly force in self-defense. We conclude the jury was properly instructed because such instruction was not supported by substantial evidence. Appellant further contends the trial court erred in allowing the People to introduce a portion of a witness's recorded interview pursuant to the rule of completeness. We agree the trial court erred, but conclude the error was harmless, and affirm.

PROCEDURAL BACKGROUND

The Kern County District Attorney's Office filed an information charging appellant with assault with force likely to produce great bodily injury with the additional allegation he personally inflicted great bodily injury (Pen. Code,[1] §§ 245, subd. (a)(4), 12022.7, subd. (a)), and battery causing serious bodily injury (§ 243, subd. (d)). The jury acquitted appellant of assault with force likely to cause great bodily injury but convicted him of battery causing serious bodily injury and the lesser included offense of misdemeanor assault (§ 240).

FACTUAL BACKGROUND

In the early morning hours of February 15, 2016, appellant, the victim, and Moises Jaquez decided to leave the bar where they had been playing pool to drive to a nearby taco shop in Jaquez's car. After the victim sat in the front passenger's seat, appellant demanded the victim give him the seat, claiming he had called "shotgun." The victim responded they were only traveling a short distance and that he was not going to fight over who gets to sit in front. Appellant sat in the back seat, but soon after they started driving appellant began choking the victim with his seatbelt, punching him in the face,

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1 All statutory references are to the Penal Code unless otherwise indicated.

and cursing at him. In response the victim attempted to turn around and punch appellant, and the two fought and cursed at each other throughout the short drive.

Immediately after arriving in the parking lot of the taco shop, appellant and the victim exited the car and began fist fighting. The victim threw appellant into the front seat of the car and continued to punch him until Jaquez told them both to get out of his car. The victim backed up and allowed appellant to get out, and the two continued to fight. After fighting for a short while longer, the victim began to back away from appellant and state that he was done fighting, but appellant continued punching the victim until he fell to the ground onto his back. Appellant then sat on top of the victim and repeatedly punched him in the face. Jaquez was able to pull appellant off the victim, but after a moment appellant ran back over to the victim, got on top of him again, and continued to punch him in the face while saying "[d]ie, just die." Appellant also put his hand over the victim's mouth and told him to "[g]o to sleep." Jaquez again pulled appellant off the victim, placed him in his car, and left the area. The victim suffered a broken jaw and loss of consciousness as a result of the assault.

DISCUSSION

I. Alleged Instructional Error

Appellant claims the trial court erred in failing to instruct the jury with the following bracketed language from CALCRIM No. 3471: "[However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend [himself] with deadly force and was not required to try to stop fighting, ….]" We disagree.

The court instructed the jury on the right to self-defense (CALCRIM No. 3470) and the limitations on the right to self-defense by an initial aggressor or in a situation involving mutual combat (CALCRIM No. 3471). Appellant did not request, and the trial court did not give the above bracketed language from CALCRIM No. 3471.

The court must only give instructions that are supported by substantial evidence and is not obliged to instruct on theories that have no evidentiary support. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823.) "Substantial evidence in this context ' "is 'evidence sufficient "to deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak." ' " [Citation.]' [Citation.] 'In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether "there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt ...." [Citations.]' " (*Id.* at pp. 823-824.)

The trial court was not obligated to give the bracketed language from CALCRIM No. 3471 because there was no evidence the victim used deadly force. Appellant and the victim engaged in a common fist fight that did not involve the victim using any more force than throwing punches. The use of force by either party only escalated when appellant knocked the victim to the ground and repeatedly punched him in the face. While there was some evidence appellant suffered either a broken tooth or had a tooth knocked out[2] during the fight, this injury alone is insufficient to show the victim engaged in a sudden escalation of deadly force, let alone acted in a way that prevented the defendant from withdrawing from the fight.

Even if we were to conclude the trial court committed instructional error, the error would have been harmless. Depending upon the basis of the claimed error, instructional error is reviewed under either *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), or *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Under the more stringent *Chapman* standard, which applies to errors of constitutional dimension, reversal is required unless the reviewing court can conclude beyond a reasonable doubt that the error

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[2] On cross-examination, Jaquez testified he observed appellant's tooth was "broken." There is no evidence in the record detailing the cause, nature, and extent of the injury.

did not contribute to the verdict. (*Chapman, supra*, 386 U.S. at p. 24.) Under the alternative *Watson* standard, which applies to errors of state law, reversal is not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*Watson, supra*, 46 Cal.2d at p. 836.)

We need not decide whether the *Chapman* or *Watson* standard for prejudicial error applies here because the error was harmless under either standard. The bracketed language in CALCRIM No. 3471 sets forth a defense for the use of deadly force under specific circumstances but is irrelevant to a defendant's use of nondeadly force. In convicting appellant of battery causing serious bodily injury (§ 243, subd. (d)) but acquitting him of assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)), the jury found appellant's assault caused serious bodily injury but not by means likely to inflict it. Based on the jury's verdict, if the bracketed language from CALCRIM No. 3471 had been given, the jury would have found the defense inapplicable because they concluded appellant did not use force likely to cause great bodily injury, let alone deadly force. Therefore, even if we concluded the trial court should have given the bracketed language in CALCRIM No. 3471, any error would have been harmless beyond a reasonable doubt.

II. Admission of Witness's Audio Statement

Appellant claims the trial court erred in allowing the prosecution to introduce a portion of Jaquez's recorded statement pursuant to the rule of completeness set forth in Evidence Code section 356. We agree the trial court erred, but conclude the error was harmless.

While cross-examining Detective Richard Dossey, defense counsel questioned him about the content of a telephone interview he conducted with Jaquez approximately eight months before trial. During defense counsel's questioning he elicited two inconsistencies between the interview and Jaquez's trial testimony. First, Dossey testified Jaquez told him that while he was driving to the taco shop and appellant and

victim were in the car fighting, the victim told Jaquez "pull over the car, I want to kick his ass." Second, Dossey testified Jaquez never told him during the interview that appellant put his hand over the victim's mouth and told him to "[g]o to sleep."

On redirect examination, the People moved to introduce the audio recording of the entire interview pursuant to Evidence Code section 356. The People argued the recording provides the context in which Jaquez made the prior statements and rebuts the inference his interview was riddled with inconsistencies by showing much of it was consistent with his trial testimony. Over defense counsel's objection, the court allowed the People to introduce the first four minutes and 48 seconds of the recording. In the admitted portion Jaquez describes the events of the evening from the point he left the bar with appellant and the victim up through the assault. The admitted portion includes the two inconsistencies elicited by the defense, as well as other details that are mostly duplicative of Jaquez's trial testimony. The latter, excluded portion of the recording primarily contains irrelevant and inadmissible material, including Jaquez's speculation that appellant and victim had a prior history, his opinion that appellant was the primary aggressor, and other tangential details that were not introduced during testimony.

Evidence Code section 356, known as the rule of completeness, provides in relevant part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party[.]" The purpose of the rule is " 'to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' " (*People v. Clark* (2016) 63 Cal.4th 522, 600, citing *People v. Arias* (1996) 13 Cal.4th 92, 156.)

Here, there was no justification for playing any portion of the interview because the inconsistencies introduced by the defense were not misleading or taken out of context. The recording merely showed Jaquez made the inconsistent statements elicited by defense counsel, and that the remainder of his statement was consistent with his

testimony. The rule of completeness cannot be invoked after a witness is impeached with one or more inconsistences within a statement to show the remainder of the witness's testimony was consistent with that statement. The purpose of the rule is to prevent one party from misleading the fact finder by introducing a statement out of context, not to bolster a witness's credibility by showing the witness has made other consistent statements.

Respondent contends the recording was also admissible as a prior consistent statement. "To be admissible as an exception to the hearsay rule, a prior consistent statement must be offered (1) after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement, or (2) when there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive. (Evid. Code, §§ 791, 1236.)" (*People v. Riccardi* (2012) 54 Cal.4th 758, 802.)

We conclude neither exception is applicable. As to the first exception, the prior consistent statements were made in the same interview as the inconsistent statements, not earlier in time. As to the second exception, the defense impeached Jaquez's credibility with prior inconsistent statements but did not make express or implied allegations that Jaquez's testimony was recently fabricated or influenced.

Although the trial court erred in allowing the prosecution to introduce the recording, the error was harmless. State law error in admitting evidence is subject to the *Watson* test. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) In making this evaluation, "an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

We begin by noting that the prejudicial impact of the court's error was minimal. The court excluded the most irrelevant and inflammatory portions of the interview, and the admitted portion only included Jaquez's description of the events of that evening, which was mostly duplicative of his trial testimony. Although the recording may have bolstered Jaquez's credibility by reiterating most of his testimony was consistent with his prior interview, the recording also highlighted the inconsistencies elicited by defense counsel. The recording did little more than repeat facts that had already been introduced through testimony.

Given the minimal prejudice caused by the admission of the recording, we conclude it is not reasonably probable that it impacted the jury's verdict, because the evidence of guilt was compelling. There was no dispute appellant assaulted the victim, so the only questions remaining for the jury were the severity of the assault and whether appellant acted in self-defense. The testimony of the victim and Jaquez established that appellant continued to assault the victim not only after he expressed a desire to stop fighting, but after the victim was on the ground and defenseless. Their testimony was corroborated by the victim's injuries, including a broken jaw, consistent with appellant's repeated punches to the face while the victim was incapacitated. Therefore, we conclude the trial court's error was harmless.

DISPOSITION

The judgment is affirmed.